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Nos. 98-366 & 98-367

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID R. McKUNE,
Petitioner,

v.

MARK L. STELTZLEN,
Respondent.

On Writs of Certiorari To The
Supreme Court Of The State Of Kansas

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA IN SUPPORT OF PETITIONERS

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The Petitioners in *McKune* are:

David McKune
Charles Simmons

The Respondent in *McKune* is:

Mark Steltzlen

The Petitioners in *Hannigan* are:

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David McKune
William Cummings
Anthony McElroy
Jamie Lanza
Mr. Wilson
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Mr. Robinson
Mr. Stokes
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The Kansas Department of Corrections

The Respondents in *Hannigan* are:

Raymond Stansbury
Michael Banks

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 35 other *amici* States join together in supporting the petitions for a writ of certiorari filed by the State of Kansas. At issue among other things is whether the *ex post facto* prohibition against retroactive punishments bars prison administrators from requiring certain inmates to participate in a remedial program -- here, a sexual abuse treatment program -- as a condition for continuing to earn future good-time credits. In holding that the clause prohibits States from requiring inmates to participate in such programs, the *amici* States respectfully submit that the lower court committed a reversible -- and highly consequential error.

The issue matters to the amici States for several reasons. First, the lower court's expansive construction of the *ex post facto* clause undermines one of the essential goals of prison administration -- rehabilitation. Whether in the area of sexual-abuse crimes or in other areas of criminology, an overriding objective of corrections work is to equip convicts to make a healthy, productive, safe and in the end permanent return to society. An interpretation of the *ex post facto* clause that prevents prison officials from fully using such treatment programs for *all* of their inmates, however, threatens to sidetrack if not affirmatively deter the achievement of each of these goals.

Second, the interpretation of the *ex post facto* clause embraced by the Kansas Supreme Court markedly contracts the necessary administrative flexibility needed to run a State prison. Prison officials with custody over an inmate serving a 20-year sentence are bound to see a host of new medical and sociological theories regarding prison administration over the course of that inmate's sentence. No doubt these developments do not give prison wardens carte blanche to impose new punishments during the course of the sentence. But surely these developments allow administrators to institute progressive treatment programs that account for these changes in

penological thinking. Again, so long as the primary thrust of the new programs is remedial rather than punitive, the *amici* States respectfully submit that these rehabilitation requirements are no business of the *ex post facto* clause.

Third, many of the *amici* States have good-time credit regulations similar to those of Kansas. Above all else, States use good-time credits to measure eligibility for early release and early consideration for parole. But, as with other remedial tools, prison administrators need flexibility to adjust those regulations to keep pace with new theories regarding rehabilitation and with fresh concerns about the safety of releasing an individual.

Even from the perspective of prisoners (also citizens of the States), it is not clear that the analysis adopted by the Kansas Supreme Court will in fact advance the liberty interests of present and future inmates. Such rigid interpretations of the *ex post facto* clause permit regulatory discretion only in the direction of rules leading to an early release. Yet few prison wardens or corrections officials will be willing to experiment with progressive early-release programs under such a one-way ratchet. At the end of the day, the lower-court decision thus "discourages" the "desirable development" of enacting laws to govern these issues and of developing new ways to rehabilitate prisoners. *Sandin v. Connor*, 515 U.S. 472, 482 (1995). For these reasons and those developed below, we submit this brief *amici curiae* for the Court's consideration.

REASONS FOR GRANTING THE WRIT

All three traditional reasons for granting the writ support the Kansas petitions here. The lower-court decision deepens a conflict of authority regarding the application of the *ex post facto* clause to discretionary prison regulations. The decision implicates essential federal questions affecting the prison-

administration interests of the sovereign States. And it fails correctly to resolve these important issues.

I. The Court Should Grant The Writ To Resolve A Growing Split Of Authority Regarding Application Of The *Ex Post Facto* Clause To Ministerial Prison Regulations.

By statute Kansas provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). In implementing the statute, the State has adopted several different sets of administrative regulations. The most recent one, and the one under attack here, requires inmates to "participate in assigned programs" -- in this instance, a rehabilitation program for those who have been convicted of sexual-abuse crimes -- in order to earn future good-time credits towards parole eligibility or early release. K.A.R. 44-6-124(g) (1993). No one disputes that a prior set of administrative regulations did not require participation in such remedial programs as a condition of earning good-time credits.

One question that arises under these circumstances is whether the *ex post facto* clause even applies to such inherently changeable ministerial rules. In providing that "[n]o State shall . . . pass any . . . *ex post facto* Law," Art. I, sec. 10, the clause prohibits only laws that "retroactively [1] alter the definition of crimes or [2] increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995). In construing the clause, the Court has never applied the provision to procedural or remedial changes in the law. Nor, to the *amici*'s knowledge, has the Court ever applied the clause to administrative regulations, or for that matter even suggested that the clause applies in this executive (as opposed to legislative) setting.

The Court's two-century silence on the application of the clause to administrative regulations, in our considered judgment, is not surprising. A prohibition against "*ex post facto* laws" is a prohibition against legislative legerdemain. It does not limit executive-branch decisions about when to prosecute, when to investigate, when to plea bargain. And it does not limit judicial-branch decisions about what the law means. So long as the legislature does not retroactively change the definition of crime or change the rules of punishment, it does not enact an *ex post facto* law. For like reasons, so long as the ministerial authority the legislature delegates to administrative agencies comports with the bar against vague laws, with the limitations of due process and with the prohibitions against double jeopardy, its actions withstand constitutional scrutiny.

Moreover, when measured against the traditional *ex post facto* yardsticks -- notice, reasonable expectations, fairness -- a focus on the underlying enactments of the legislature in no way diminishes the clause's force. Consider again the pertinent language of the Kansas law: "Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). Nothing Kansas did wavered from its steadfast position that good-time credits would be earned. And no prisoner in light of this statute had any tenable basis for assuming that the administrative rules regarding *how* good-time credits were earned would otherwise remain constant. Still less would a prisoner serving a lengthy sentence have any such expectation. Otherwise, why would the legislature delegate ministerial authority to implement regulations? The very purpose of allowing corrections officials (rather than the legislature) to set this policy is because these kinds of issues lend themselves to on-the-scene adjustments, which again are as apt to benefit inmates as frustrate them. True, this delegation of agency authority does not permit a regulation that itself imposes punishment, a development that would either implicate double

jeopardy or due process. But so long as the regulations fit within an appropriate delegation of ministerial authority, they do not violate *ex post facto*.

Even if the *amici* States are wrong on this point (which, we respectfully submit, they are not), that does not diminish the force of the petition. Quite to the contrary: In view of the Court's silence on this issue, the lower courts have long struggled to resolve it, with some courts adopting the position embraced by the Kansas Supreme Court and others adopting the position Kansas and the *amici* States have proposed. As Kansas points out in its petitions, several federal courts of appeals have held that administrative regulations do not violate *ex post facto*. *See, e.g., United States v. Ellen*, 961 F.2d 462, 465-66 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992); *Bailey v. Gardebring*, 940 F.2d 1150, 1155-57 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 503 U.S. 952 (1992); *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir. 1988). Nor has this conflict of authority gone unnoticed or (as this case confirms) been non-recurring. *See, e.g., Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of certiorari on the issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n.10 (1st Cir. 1996).

In the end, the conflict of authority regarding the application of the *ex post facto* clause to administrative regulations supports the writ. On this basis alone, the writ should be granted.

II. The Lower-Court Decision Implicates A Matter Of Grave Importance To The States.

As this Court has long recognized, prison management represents a core sovereign function of the States. It "is difficult to imagine an activity in which a State has a stronger interest, or

one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

Recognizing the integral nature of prison management to the States, the Court has been careful to reconcile the constitutional rights of prisoners with the flexibility prison administrators need to run their corrections systems. For this reason, in all constitutional cases, not just First Amendment cases, *see Turner v. Safley*, 482 U.S. 78 (1987) the Court has adopted a lower standard of review regarding constitutional claims by inmates. The decision to do so, the Court has reminded litigants, is

> based upon the need to reconcile our long-standing adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment. We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.

Washington v. Harper, 494 U.S. 210, 223-224 (1990).

These considerations -- particularly the need to have flexibility in rehabilitating and securing prisoners -- have particular force here. Prison populations are expanding at unprecedented rates, having increased by more than 111 percent over the last six years. *Prisoners in 1997*, Bureau of Justice

Statistics Bulletin (Aug. 1998) at 4. Current statistics show that approximately 1100 new inmates are added to the nation's prisons each week, enough to fill almost two average-size prisons. *Id.* at 1, L. Greenfeld, A. Beck, and D. Gilliard; *Prisons: Population Trends and Key Issues for Management*, 21 Criminal Justice Review 4, 5 (1996). State prisons not surprisingly are operating at an average of 129% of capacity with a recent survey revealing that 39 states consider their overcrowding problems to be "serious," "very serious," or "critical." *Prisoners in 1997, supra* at 4; C. Hill, *Population Projections*, Corrections Compendium, Vol. 23, No. 5 (May 1998) at 15-17.

In addition to the growth in prison populations, States have had to address rapid changes in the composition and background of their inmates. There have been record increases in the number of violent offenders and prisoners affiliated with gangs, each presenting unique management challenges to corrections officials. *Prisoners in 1997, supra* at 11 (noting that violent offenders were responsible for 50% of the recent increase in overall prison population.); A. Beck, *supra* at 6, Table 7; C. Huff and M. Meyer, *Managing Prison Gangs and Other Security Threat Groups*, 1(4) Corrections Management Quarterly 10, 11 (1997). Growing numbers of prisoners, the statistics show, tend to commit new offenses when given access to supervised release. Greenfeld, Beck, and Gilliard, *supra* at 12; Beck, *supra* at 10-11. These trends are expected to continue and intensify. R. Wilkinson, *The Future of Adult Corrections*, 1(1) Corrections Management Quarterly 57 (1997); A. Beck, *supra* at 13. In recent years, prison wardens also have witnessed an unprecedented influx of female inmates and HIV-positive inmates, each requiring system-wide changes to prison management. *H.I.V. in Prisons and Jails*, Bureau of Justice Statistics (Aug. 1997); *Census of State and Federal Correctional Facilities*, Bureau of Justice Statistics Bulletin (Aug. 1997) at 1; Greenfeld, Beck, and Gilliard, *supra* at 18.

An increasing number of young inmates has created additional pressures of their own. A. Beck, *Growth, Change and Stability in the U.S. Prison Population, 1980-1995*, 1(2) Corrections Management Quarterly, 1, 4, 5, Table 5 (1997); C. Heard, *Forecasting Models for a Changing Inmate Population: Implications for Public Policy*, 18 Criminal Justice Review 1,2 (Spring 1993).

In view of these rapid changes in prison populations and in view of the penological challenges that come with them, it is particularly important that prison officials have flexibility to adjust their operating procedures to account for these developments. Yet rather than account for these challenges to prison management, the lower-court decision has exacerbated them.

At a specific level, the decision precludes frequently-needed refinement of one of the tested incentives for good behavior and rehabilitation -- good-time credits. Such programs, it has been recognized, provide essential motivation for good conduct and for prisoners to rehabilitate themselves in preparation for release:

> The actual allowance of 'good time' is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.
>
> The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and 'good time' granted as an incentive.

McGinnis v. Royster, 410 U.S. 263, 273 n.20 (1973). The decision below, however, prevents inherently-necessary modifications to good-time credits and thus interferes with an aspect of penal administration that this Court has recognized is best left to the discretion of corrections officials. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

At a more general level, the lower-court decision could have a potentially broader, more disruptive impact. Given the Kansas Supreme Court's emphasis on the "disadvantageous" effect of new regulations, the decision could well ossify operating procedures in other vital areas. In response to the ever-shifting dynamics of prison management, 80% of the states have altered their internal operating procedures since 1995 in ways that are arguably "disadvantageous" to prisoners. *Inmate Privileges*, Corrections Compendium, Vol. 23, No. 7 (July 1998) at 6. Those changes deal with such diverse matters as health care administration, property and entertainment privileges, smoking, occupational training and computer use, and DNA testing for criminal investigatory purposes. *Id.* at 7-8. In view of the arguably "disadvantageous" nature of those changes, they all could well be endangered by the lower-court decision. In each of these respects, the lower-court decision affects matters of significant federal import. This factor, too, independently supports the writ.

III. The Lower Court Erred.

Even aside from the conflict of authority heightened by the lower-court decision and the importance of the issues presented, the flaws in the decision by the Kansas Supreme Court by themselves support the writ. One analytical flaw in particular overrides all others -- the court's mistaken assumption that a sexual-abuse treatment program constitutes "punishment" under the United States Constitution.

After properly acknowledging that the *ex post facto* clause covers only "additional *punishment*" (Pet. 14a) (emphasis added), *see Collins v. Youngblood*, 497 U.S. 37, 41 n.2 (1990) ("the Court has consistently adhered to the view . . . that the *Ex Post Facto* Clause applies only to penal statutes"), the Kansas Supreme Court proceeded to characterize Kansas's rehabilitation program as punitive in nature. That is flatly wrong.

To start with, no *ex post facto* decision from this Court supports such a wide-ranging construction of punishment. All of the relevant cases invalidating changes in State law plainly contemplate new *punitive* measures. *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997) (change in statute required reincarceration of inmates that had been released); *Miller v. Florida*, 482 U.S. 423 (1987) (change in statute required longer prison sentence); *Weaver v. Graham*, 450 U.S. 24 (1981) (change in statute required longer incarceration); *Lindsey v. Washington*, 301 U.S. 397 (1937) (change in statute required longer incarceration). The sensible requirement that individuals convicted of sexual-abuse crimes participate in treatment programs, whether in existence at the time the crime was committed or not, simply does not fall within the factual or legal parameters of these cases. The reason is straightforward: The decision to require inmates to participate in these new rehabilitation programs is self-evidently remedial in nature. A contrary decision would dramatically hamstring not just these progressive forms of treatment but would have the perverse effect of limiting many other similar programs as well. For example, if a prison may not pass a regulation requiring convicted sex offenders to participate in treatment programs, it is not clear that it could require inmates who are high school dropouts to take vocational or other educational courses. Surely the Constitution is not an adversary of such well-meaning programs.

Recent precedent concerning the double jeopardy clause is to the same effect. There, as here, State laws implicate the provision only if they are punitive, as opposed to remedial, in nature. *See Hudson v. United States*, 522 U.S. __, 118 S. Ct. 488, 493-95 (1997). There, as here, a program designed to treat, as opposed to incarcerate, a sexual offender does not violate the Constitution. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). And there, as here, "whether a sanction constitutes punishment is not determined from the defendant's perspective" because otherwise virtually all government measures would be deemed punitive. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1995).

Under the Kansas Supreme Court's decision, however, there are now two types of "punishment" under the United States Constitution -- one for double jeopardy purposes and one for *ex post facto* purposes. That cannot be the law. Surely the same limitation on punishments carries the same meaning throughout the individual-liberty guarantees of the Constitution. Thus, as the Court already indicated in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the operative question is not the inmate-centric view adopted by the Kansas Supreme Court -- whether a change in law "disadvantages" the inmate. It is whether the law "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506 n.3. And, as the Court's holdings all make clear, the *ex post facto* clause (like the Constitution's other limits on punishment) does not limit a State corrections agency from imposing new remedial requirements on its inmates -- so long as they are neither punitive in design nor effect.

These considerations also support the writ. The Kansas Supreme Court's decision goes well beyond the punitive focus of this Court's *ex post facto* precedents and in the process creates a schism in the definition of "punishment" for *ex post facto* and for double jeopardy purposes. The Court should grant

review to correct this critical error and to prevent it from being exported to other States.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ.

Respectfully submitted,

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